In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 307

ROYAL INSURANCE COMPANY, LTD.
(a corporation),
Petitioner,

vs.

ROBERT A. SMITH,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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The petition contains a statement of the case and references to the opinions below.

JURISDICTION.

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U. S. Code, Title 28, Section 347).

The judgment of the Circuit Court of Appeals now sought to be reviewed was filed and entered May 6, 1940 (R. 375). Petition for a rehearing was seasonably filed under the applicable rules of Court, and denied on June 7, 1940 (R. 377). Issuance of mandate has been stayed to and including August 13, 1940, and until disposition of the petition (R. 377-8, and subsequent order dated July 2, 1940).

ERRORS TO BE URGED.

1. The Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in reversing a judgment admittedly correct (under the pleadings, evidence, and law of the case) and ordering a third trial in order to give the losing party a fifth opportunity to amend his complaint to allege a new and different basis of recovery.

2. The Circuit Court, in holding that a month-to-month tenancy is a lease or leasehold interest within the meaning of a policy of leasehold fire insurance, has decided an important question of general insurance law which has not been settled by this or any Court, and which should be settled by this Court; and in so holding the Circuit Court, by ignoring unquestioned principles applicable to the construction of contracts, has rendered a decision probably in conflict with applicable decisions of this Court.

ARGUMENT.

I. THE DECISION CREATES, INSTEAD OF CURING, ERROR.

In effect, the Circuit Court of Appeals has said to respondent: *You are seeking recovery on a policy of insurance covering on your leasehold interest in certain real property. In your complaint you have alleged the factual basis of the leasehold interest you claim to have had, namely, an express lease for a term running to destruction of your improvements on the property. You have failed to establish this lease or any other lease for a term; therefore, had the trial Court rendered judgment in your favor, we should have been forced to reverse the judgment, just as we did on the first appeal herein, because, as we there said* (77 Fed. (2d) 157, 159):

> *"* * * Since the insurance company has not had an opportunity to meet and defend against any other theory of liability, the cause must be sent back for retrial."*

However, the evidence does establish that you had a month-to-month tenancy, which is an insurable interest. We think that if you amend your complaint to allege this month-to-month tenancy as the factual basis of your right to recover, instead of an express lease for a term (which you did not have), you may be able to recover upon a new trial; provided, of course, that the insurance company is unable to establish any of its affirmative defenses, which it waived at the last trial. Therefore, we shall reverse the judgment against you in order to permit you to so amend your complaint and try again.

In short, the Circuit Court has ordered a reversal for the sole purpose of permitting respondent to amend his already muchly amended complaint to conform to the proof, necessitating thereby a third trial upon a new theory of recovery at variance with that chosen by respondent himself.

1. It is necessary, in a suit upon a policy of insurance, for plaintiff to allege in his complaint the factual basis of his claimed insurable interest.

M. S. Dollar S. S. Co. v. Maritime Ins. Co. (C. C., N. D. Cal.) 149 Fed. 616, 617; suit on a policy of marine insurance:

> "There is no allegation * * * in the complaint touching the nature of the interest or what it was that plaintiff had, if any, and the complaint is palpably insufficient in this particular. I deem it insufficient to allege simply that plaintiff had an interest. This is a conclusion. *The complaint should show what that interest is or the nature thereof, so that the court could see at once what claim is being made as to plaintiff's property right in the vessel. (Cits.)*"

8 *Couch, Cyc. of Insurance Law,* 6822:

> "In the case of insurance upon property, the declaration should contain an averment *of such facts* as show an insurable interest in the insured plaintiff."

2. Departure in proof from the factual basis or ground of recovery alleged is fatal, and the theory of liability urged by plaintiff upon trial may not be abandoned on appeal.

This principle is well settled; we refer to a few of the many authorities asserting and applying it.

Denver Union Stock Yard Co. v. U. S., 304 U. S. 470, 484-5, 58 S. Ct. 990, 82 L. Ed. 1469, 1481:

> "But we are not called on to decide that question. * * *
>
> The burden was on appellant [plaintiff] by direct allegations plainly to set forth the facts on which it intended at the trial to maintain that the rates are confiscatory. * * * Its complaint failed to disclose the claim it now makes. * * * As the issue was not appropriately presented below, appellant is not entitled to have it decided here."

Lesser Cotton Co. v. St. Louis etc. Ry. Co. (C. C. A. 8) 114 Fed. 133, 142:

> "It is too late for the plaintiffs, after the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery * * *."

G. W. Sheldon & Co. v. Hamburg Amer. etc. (C. C. A. 3) 28 Fed. (2d) 249, 251:

> "A libelant must recover, if at all, upon the cause of action alleged. He may not allege one cause of action and prove another. 'The allegata and probata must reciprocally meet to conform to each other.' If the law were otherwise, the respondent would never be prepared to meet the proofs in the case. Courts would be subjected to interminable delays, or causes of action would not be decided upon their merits."

This rule has been frequently recognized and applied in the Ninth Circuit.

Hartford Fire Ins. Co. v. Bonner Mercantile Co. (C. C. A. 9) 56 Fed. 378; suit by an insurance com-

pany to set aside an award of arbitrators. Judgment at trial went for defendants; plaintiff appealed, urging that the evidence established a ground of misconduct sufficient to invalidate the award, though not pleaded. The Circuit Court said (p. 382):

> "Without discussing the question whether this misconduct was sufficient to impeach the award, it is sufficient, so far as this case is concerned, to point to the fact that the complainants, in drawing their bill, did not set forth these facts as ground for setting aside the award, and, after the conclusion of the evidence, did not see fit to ask leave to amend, so as to avail themselves thereof."

Van Norden v. Lumber Co. (C. C. A. 9) 17 Fed. (2d) 568, 570:

> "In reviewing the proceeding * * *, we are limited to errors in its [the trial court's] rulings, and in an appellate court the plaintiff in error may not mend his hold and present a ground of recovery not suggested to the trial court."

Parrott Estate Co. v. McLaughlin (C. C. A. 9) 89 Fed. (2d) 188, 190:

> "It has been uniformly held that the theory upon which the case was tried in the lower court should be the theory considered on the appeal * * *."

The rule in California is the same.

Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704, 707;

Eucalyptus Growers Assn. v. Orange County N. & L. Co., 174 Cal. 330, 163 Pac. 45, 47;

Gibson Properties Co. v. City of Oakland, 12 Cal. (2d) 291, 83 Pac. (2d) 942, 946;

Sullivan v. Vera, 125 Cal. App. 303, 13 Pac. (2d) 770, 772-3.

See, also:

Union Pacific R. Co. v. Wyler, 158 U. S. 285, 290-3, 15 S. Ct. 877, 39 L. Ed. 983, 988-9;

Missouri etc. Ry. Co. v. Wulf, 226 U. S. 570, 575-7, 33 S. Ct. 135, 57 L. Ed. 355, 363;

Lehigh Valley R. Co. v. State of Russia (C. C. A. 2) 21 Fed. (2d) 396, 402-3;

Schulenberg v. Norton (C. C. A. 8) 49 Fed. (2d) 578, 579;

3 *Am. Jur.;* Appeal and Error, Secs. 253, 281, 830.

3. Amendments to conform to proof are permitted on appeal only to sustain a judgment, and not to reverse a judgment otherwise proper.

While permission to amend a complaint to conform to the proof is properly granted by an appellate tribunal when a case is *reversed for other reasons,* or when an otherwise correct decision for a plaintiff is *affirmed;* it is unique (and, we submit, a wide departure from the accepted and usual course of judicial procedure) for a Circuit Court of Appeals to reverse an otherwise correct disposition of the cause by the trial Court merely because the Circuit Court believes that another trial *might* result differently if the losing party amends his pleadings to rely upon a different basis of recovery.

Moss v. Jacobowitz (N. J.) 11 Atl. (2d) 45, 46:

"The appellants assert the right to set up complainant's acquiescence here. They have no such right. This Court may order an amendment if the amendment sought is within the issue raised by the proofs *but only to accomplish an affirmance of the judgment or decree, never a reversal. The amendment * * * could not be allowed here for the purpose of effecting a reversal. This, as a matter of law, is entirely settled.*"

Johnston v. Muskegon County (Mich.) 162 N. W. 341:

"The plaintiff, to reverse this judgment, must affirmatively show error; and, to do so, I think must show by the record, not only that he has proven, but has alleged, actionable negligence on the part of the defendant which the Court declined to submit to the jury. The fact that in making his proof, as to how the accident occurred, he gave evidence tending to show negligence other than that alleged in the declaration, does not broaden the allegations therein contained, particularly when to so broaden them would work a reversal of the case. *It must be borne in mind that the question here submitted is not whether the defendant, on the state of the record, could obtain a reversal of a judgment in favor of the plaintiff if the Court had submitted to the jury the question of negligence other than that alleged in the declaration.* The defendant *might be estopped* by the record made in the Court below from claiming here that a ruling of the trial Court, which he had there acquiesced in, was erroneous. Such is not the question submitted

to us. *Here the plaintiff is seeking a reversal because the Court failed to submit to the jury negligence not alleged in the declaration.* * * *

Counsel for the plaintiff most strenuously urges that the benefit of the statute of amendments be applied in this case. * * *

* * * This statute should be applied to save a judgment, *but not to work a reversal.* * * *

This statute has been frequently invoked in this Court to prevent mistrials, and on numerous occasions it has been held that, inasmuch as the amendment might have been made in the Court below, this Court would make the amendment here on its own motion. (Cits.) *But this is done to work an affirmance, not a reversal; to cure an error, not to create one.* (Cits.)

I think the trial Court correctly construed the declaration, and that *we should not, either upon our own motion, or at plaintiff's request, so amend the declaration as to create error and then reverse the case for such error.*"

21 *Ruling Case Law* (Pleading, Sec. 138) 589:

"As a general rule, the appellate courts have been liberal in allowing an amendment of the pleadings or in regarding the amendment as made, *to support the judgment,* where the amendment is of such a nature that it should have been allowed by the lower court on request, and substantial justice would be promoted by such procedure. *But appellate courts refuse to regard such an amendment as made, or permit an amendment to conform to the proof, for the purpose of reversing a judgment otherwise correct* * * *."

See also:

Brokaw v. Bank of Deaver (Wyo.) 261 Pac. 905, 907;

Peterson v. Lincoln County (Neb.) 138 N. W. 122;

Taylor v. Stanley Co. (Pa.) 158 Atl. 157, 159;

Trustees v. Ritch (N. Y.) 45 N. E. 876, 37 L. R. A. 305, 326;

Fitch v. Mayor, 88 N. Y. 500, 502-3;

Williams v. Hall, 6 Bosw. 674.

We direct attention to the pointed language of this Court in *Warner v. Godfrey,* 186 U. S. 365, 22 S. Ct. 852, 46 L. Ed. 1203, as set out in the following quotation from the opinion of the Supreme Court of Utah in *Grand Central Min. Co. v. Mammoth Min. Co.* (Utah) 83 Pac. 648, 685:

> "If such amendments [of a complaint to conform to proof] * * * were sanctioned, the ingenuity of counsel would not fail in pointing out, upon each succesive defeat a new avenue leading to another experiment, until the bankruptcy of the litigants would finally end the controversy. In *Warner v. Godfrey* [supra], the complainant filed his bill in equity to set aside a conveyance on the ground of actual fraud, and, being defeated, obtained leave to amend his bill, claiming the same relief, but upon the ground of constructive fraud. The trial court found that the charges of actual fraud were unfounded, and in this the appellate court of the District of Columbia concurred, but held that 'from another point of view, made clear by the testimony, though it may not be specifically

presented by the pleadings', acts constituting 'legal or constructive fraud', the plaintiff was entitled to prevail, reversed the decree dismissing the bill, and directed the lower court to permit an amendment. The bill was amended accordingly, and a decree entered in favor of the plaintiff. Then on appeal to the Court of Appeals this decree was affirmed, and thereafter an appeal taken to the Supreme Court of the United States. That court held it error to permit the amendment, and, speaking through Mr. Justice White, said: *'It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of a cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground for relief.'* "

American Mills Co. v. Hoffman (C. C. A. 2) 275 Fed. 285, 293-4:

"It is no answer to say that the defendant was not harmed by what was done. [Trial court permitted plaintiff to amend his complaint in a substantial particular after both sides had rested.] We have no right to speculate upon that question. But it is by no means clear that he was not seriously prejudiced. In *Southwick v. First National Bank of Memphis* [84 N. Y. 420], the action alleged and the cause of action proved at the trial differed. It was said that the defendant had probably not been misled. Judge Earl, writing for

the New York Court of Appeals, referring to this, declared that it was no answer. He said:

> *'A defendant may learn outside of the complaint what he is sued for, and thus may be ready to meet plaintiff's claim upon the trial. He may even know precisely what he is sued for when the summons alone is served upon him. Yet it is his right to have a complaint, to learn from that what he is sued for, and to insist that that shall state the cause of action which he is called upon to answer, and when a plaintiff fails to establish the cause of action alleged the defendant is not to be deprived of his objection to a recovery by any assumption or upon any speculation that he has not been injured.'"*

II. A MONTH-TO-MONTH TENANCY IS NOT A "LEASE" OR "LEASEHOLD INTEREST" WITHIN THE MEANING OF THOSE TERMS AS USED IN A POLICY OF LEASEHOLD FIRE INSURANCE.

The insurance contract in suit covers the assured's **"leasehold interest"**, and is expressly **"predicated"** upon the existence of a **"lease to land"** (R. 221).

The Circuit Court of Appeals has determined from the evidence that respondent's interest in the land was a month-to-month tenancy, and has concluded that such a tenancy is "embraced" within the coverage of the policy.

1. The construction adopted by the Circuit Court.

The definition of the terms "lease" and "leasehold", says the Circuit Court (R. 373)—

> "*appears to embrace,* in effect, any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant."

This would comprehend even a tenancy at will, according to the quotations found in the opinion (R. 373).

It is apparent that the opinion adopts a strictly technical legal definition, giving to these words the most expansive meaning possibly applicable to them.

Significantly, no consideration seems to have been given by the Court to whether the terms as used in the policy are ambiguous; to whether they have a plain meaning in common usage; nor to what that plain meaning, if any, is.

Petitioner does not dispute the abstract proposition that the terms "lease" and "leasehold", technically and legalistically defined, are capable of "embracing" any type of tenancy, including one from month-to-month or at will. Petitioner does contend, however, that words used in a contract (including an insurance contract), unless of doubtful meaning, are to be given that significance which common speech imports; that the words in question have acquired a plain, commonly accepted meaning in ordinary and popular usage; and that that meaning definitely does *not* embrace tenancies from month-to-month or at will.

Without exception, each of the cases quoted or cited in the opinion (R. 373-4) involved *a written agreement specifying a fixed term during which occupancy was to continue.* It is entirely accurate to say that the authorities relied on by the Circuit Court in support of

the definition adopted are not, separately or collectively, even persuasive authority that the terms "lease" and "leasehold", in normal usage, "embrace" within their meaning a month-to-month tenancy.

The first quotation (R. 373) is from *Bouvier* as quoted in *Walls v. Preston,* 25 Cal. 59. We merely note that *Bouvier's Law Dictionary* (Rawle's 3d Rev.) defines "leasehold" as follows:

> "Leasehold. The estate held by virtue of a lease. **In practice the word is generally applied to an estate for a fixed term of years.**"

The second quotation (R. 373) is from *Ruling Case Law* as quoted in *Stone v. City of Los Angeles,* 114 Cal. App. 192, 299 Pac. 838. We merely note that in the very same section quoted by the Circuit Court [16 *Ruling Case Law* (Landlord and Tenant, Sec. 2) 531] the text continues:

> "* * * **As ordinarily employed, the word 'lease' implies a term** and reversion to the owner of the land after its termination, and only a chattel interest passes. The term **'tenant'** is, however, sometimes used in a **broader sense** so as to include 'one who holds or possesses lands or tenements by any kind of title, either in fee, for life, years or **at will.**' "

2. Insurance contracts, like other contracts, are to be taken and understood in their plain, ordinary, and popular sense.

California Civil Code, Sec. 1644:

> "Words to be understood in usual sense. The words of a contract are to be understood in their ordinary and popular sense, *rather than according to their strict legal meaning* * * *."

1 *Restatement of Contracts* 319, Sec. 235 (a):

> "The *ordinary meaning* of language throughout the country is given to words unless circumstances show that a different meaning is applicable."

This has been called the golden rule of construction (3 L. R. A. 859). It applies to contracts of insurance, the terms of which are to be construed *"in their plain, ordinary, and popular sense"* (*Imperial Fire Ins. Co. v. Coos County,* infra). As in the case of other contracts, policies of insurance will be interpreted most strongly against the party who prepared them (the insurer), *but only if the language used is ambiguous or of uncertain meaning.*

Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. Ed. 231;

Bastian v. British American Assur. Co., 143 Cal. 287, 77 Pac. 63;

Greenberg v. Continental Casualty Co., 24 Cal. App. (2d) 506, 75 Pac. (2d) 644.

In *Aschenbrenner v. United States Fidelity & G. Co.,* 292 U. S. 80, 54 S. Ct. 590, 78 L. Ed. 1137, the Supreme Court reversed the Ninth Circuit Court of Appeals for the *identical error* in construing a policy of insurance which that Court has, we respectfully submit, repeated in the case at bar. There, the Circuit Court had construed the word "passenger" "by applying the term as it was said to be defined in the law of common carriers". The Supreme Court, holding this to be error, said (292 U. S. 84-5, 78 L. Ed. 1140-1):

> "But it is unnecessary here to follow *the niceties of legal reasoning and terminology* applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only with the sense in which its words were used. * * * Unless it is obvious that the words are intended to be used in their technical connotation they will be given *the meaning that common speech imports.*"

The *Aschenbrenner* decision was in favor of the insured and against the insurer. However, the rules of construction are of general application, regardless of the result reached. (*Imperial Fire Ins. Co. v. Coos County,* supra.)

3. The correct meaning of the words "lease" and "leasehold" as used in the policy excludes a tenancy from month-to-month, because it imports a hiring for a fixed or determinate term.

> "The meaning of English words and phrases is within the judicial knowledge of the court." 20 *Am. Jur.* (Evidence, Sec. 67) 89.
>
> *Nix v. Hedden,* 149 U. S. 304, 13 S. Ct. 881, 37 L. Ed. 745.

The words "lease" and "leasehold" are common to ordinary business usage in the daily affairs of mankind, and they have acquired a fixed and definite meaning,—a generally accepted significance.

Jamaica Pond Aqueduct Corp. v. Chandler, 91 Mass. 159, 167, per Bigelow, C. J.:

> **"Undoubtedly the word 'lease', as ordinarily interpreted and understood, * * * denotes the creation of an estate for years commonly called a term."**

Mayberry v. Johnson, 15 N. J. L. 116, 121:

> "* * * **In common parlance,** where it is said a man has a *lease* for property, nothing more is meant, than that he has **a term, or an estate for years** in the premises * * *."

Levin v. Saroff, 54 Cal. App. 285, 201 Pac. 961, 962-3:

> "To create a valid *lease,* but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, **a definite and agreed term;** and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only *essentials.*"

[To have a definite term, it is not necessary that the lease terminate on a fixed date.

Raynolds v. Hanna (C. C., N. D. Ohio, E. D.) 55 Fed. 783, 800:

> "In the present case the term (of the lease) is sufficiently definite. * * * It is to continue so long as there is coal that can be 'practicably mined'. This constitutes a *'determinate period'.*"

Compare, respondent's *alleged* tenure running until destruction of the improvements (Complaint, par. II; R. 2-11).]

Koehler v. Dennison (Ore.) 143 Pac. 649; suit to recover moneys obtained by fraud. It was alleged that the defendants falsely represented to plaintiff that, if he would pay them a stipulated sum and take possession of a certain barber shop, one of the defendants would, as soon as the sale was consummated, secure a

"lease" of the premises for plaintiff. Plaintiff paid defendants and took possession; he then applied to the owner of the premises for a lease, which was refused him. In affirming judgment for plaintiff, the Court said (p. 652):

> "Soloman accepted from Koehler the stipulated rent in advance for a month thereby entitling him to the possession of the barber shop for that time. *The parties unquestionably understood by the use of the word 'lease', as employed by plaintiff, that it meant a writing executed to him by Soloman evidencing a demise of the premises for a reasonable term.*"

Text writers, dictionaries (both lay and legal), and encyclopedias, almost without exception, recognize the common meaning of "lease" and "leasehold", and many of them expressly distinguish this common meaning from the technical legal definition used by the Circuit Court. For the convenience of the Court, we have collected a number of these definitions in an appendix to this brief. As representative thereof, we here refer to but two.

Abbott's Law Dictionary:

> "Leasehold. Any interest in land less than freehold *might* be so called; *but, in practice, the word is generally applied to an estate for a fixed term of years.*"

The Oxford Dictionary:

> "Lease. a. A contract between parties, by which the one conveys land or tenements to the other for life, for years, or at will, usually in consideration of rent or other periodical compensa-

tion. * * * *In popular language lease is usually confined to a conveyance by deed for a term of years.*"

4. The record shows that the parties intended to use the words "lease" and "leasehold" in the usual sense.

Respondent's complaint (par. II; R. 2-11) alleges that he had a lease for a term running until destruction of the improvements, and further alleges (par. III; R. 11-14) that prior to the issuance of the policy he "stated" to petitioner that such was the interest he had and desired to insure.

The uncontradicted testimony of respondent's witness Hanley, who acted for respondent in procuring the policy, is clear.

*"'Do you recall, Mr. Hanley, making a statement to me * * * on July 15, 1932?*

A. *Yes, sir, a voluntary statement.*

Q. *Do you recall that I asked you on that occasion as follows:*

"Q. *And you [Hanley for respondent, and Evans for petitioner] worked on the assumption that there was a lease between the Belvedere Land Company and Smith's [respondent's] predecessors in interest?*

A. *That is correct; * * * the company [petitioner] would not have issued the policy, or Matt Evans would not have approved of the policy unless we thought there was a lease * * *.*" * * *

Q. *That accords with your recollection, does it?*

A. *It does, yes.'*" (R. 328-9.)

"Q. *It is a fact, is it not, that the lease you and Mr. Evans were talking about was a lease*

which ran until the building was destroyed; is that not correct?

A. *That would be correct.* * * *

Q. * * * *Did you or did you not tell Mr. Evans that Mr. Smith had a lease to the property?*

A. *I told Mr. Evans that Mr. Smith had a lease to the property through his predecessors, through Bland, through Keil and to himself.* * * *

Q. *You did tell Mr. Evans, didn't you, that Mr. Smith held a tenancy of the property as long as his building remained on the property?*

A. *That is correct."* (R. 331-2.)

CONCLUSION.

Petitioner earnestly urges that the writ issue as prayed; that the decision of the Circuit Court of Appeals be reversed; and that the judgment of the trial Court be affirmed.

Dated, San Francisco, California,
August 1, 1940.

Respectfully submitted,
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(Appendix Follows.)